Supreme Court, U.S
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No. ____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term 1996

J. MICHAEL SCHAEFER,

Petitioner,

v.

IRA FEFFERMAN dba UPTOWN PROPERTY MANAGEMENT

On Petition For A Writ Of Certiorari
To The Superior Court Of The State Of California

PETITION FOR A WRIT OF CERTIORARI

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50 pp

QUESTIONS PRESENTED

1. Whether Cal. Code of Civ. Proc. sec. 1286.2 which limits challenge to an arbitration award to specified narrow grounds violates petitioner's right by agreement or otherwise to review errors of law consistent with his Constitutional protections of due process and equal protection of the law;

2. Whether court's denial of petitioner's claim to be prevailing party, consistent with decisions of the jurisdiction, and Cal. Code of Civ. Proc. sec. 1032(4) violates petitioner's constitutional protections to equal protection of the law;

3. Whether court's striking of petitioner's cross-claim as a discovery sanction is sufficiently drastic to violate petitioner's Constitutional protections of due process and equal protection of the law.

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PETITION FOR A WRIT OF CERTIORARI

J. Michael Schaefer respectfully petitions for a writ of certiorari to review the judgment of the Superior Court of the State of California (Appellate Department).

OPINIONS BELOW

The opinion of the Arbitrator (Municipal Court), of the Superior Court, and denial of review by the Court of Appeal and the California Supreme Court are set forth in Appendix.

JURISDICTION

The California Supreme Court entered its decision on April 16, 1997. The petition for a writ of certiorari was filed on July 14, 1997. Jurisdiction of this Court rents on 28 USC sec. 1257(a).

STATUTORY PROVISIONS INVOLVED

Cal. Code of Civ. Proc. 1286.2 provides:

> The Court shall vacate award if court determines: (a) award was procured by corruption, fraud or other undue means; (b) there was corruption in any of the arbitrators; (c) the rights of the party were substantially prejudiced by misconduct of a neutral arbitrator; (d) arbitrators exceeded their powers and award cannot be corrected without affecting the merits of the decision upon the controversy submitted; (e) the

> rights of the party were substantially prejudiced by refusal of arbitators to postpone hearing upon sufficient cause therefor or by refusal of the arbitrators to hear evidence material to the controversy or by other conduct . . . contrary to provisions of this title; (f) an arbitrator making award was subject to disqualification but failed to disqualify.

Cal. Code of Civ. Proc. sec. 1032 provides:

> subsection (4): "prevailing party includes . . . a defendant where neither plaintiff nor defendant obtains any relief, and a defendant as against those plaintiffs who do not recover any relief against that defendant."

Cal. Code of Civ. Proc. sec. 2023(b)(4)(A) provides:

> "The court, after notice and opportunity for hearing, may impose the following sanction against anyone engaging in conduct that is a misuse of the discovery process . . . an order striking out the pleadings of any party engaging in the misuse of the discovery process".

STATEMENT OF THE CASE

San Diego apartment owner Schaefer, petitioner herein, contracted with property manager Fefferman, respondent, to manage Schaefer's Riviera Apartments, from mid-December to mid-May, 1994. Schaefer became dissatisfied with performance and conduct of respondent and gave him 30 days termination notice and respondent surrendered the property after collecting June rents exceeding $20,000, paying no June bills, making cash demand on petitioner for $10,000 at peril of suit, and

upon Schaefer's inquiry without payment, commenced litigation for $7795.15, a sum which included some $6,040 in unpaid vendor's bills. (Arbitrator's opinion, p. 3, line 10) Petitioner cross-claimed for an accounting, negligence, deceit and other relief.

Respondent's counsel commenced extensive discovery, not less than 11 hours of deposition of petitioner both in San Diego and in his new home in Las Vegas, a deposition "Referee" to participate, making extensive court applications to shorten time for any motion, seeking sanctions monetarily and issue, and finally stipulated to arbitration by documents that clearly preserved appellate rights, which petitioner believed to be issues of law, such as the cross-complaint stricken; the arbitration being treated as an accounting. Several months prior to arbitration, a Damages Demand was filed pursuant to California procedure, petitioner immediately paying same, $15,605.79, (App. 30, l. 3) notwithstanding the Complaint for less than half that amount, and Petitioner furthermore paid some $6,040 in vendor's bills when same were finally surrendered to him by Respondent.

The arbitration awarded -0- damages to the parties, petitioner defeating a punitive damage demand, for fraud, respondent's 5th cause of action, that could have run $25,000 (jurisdiction of the Municipal Court).

Appeal as a matter of right exists only as to the Superior Court Appellate Department, which unanimously affirmed without comment, ignoring Petitioner's constitutional argument there. The California Supreme Court similarly denied petition, leaving petitioner with no meaningful review. In addition to the $48,000 attorney

fee award, and costs of more than $5,000, the trial court has in a severable decision awarded $33,000 in post-judgment attorney fees, said post-judgment fee award now subject to review by the same Superior Court Appellate Department. There has been a final decision as to all issues in this case, including prevailing-party-status, and post-judgment attorney fees are nullified if petitioner ultimately is prevailing party, or if there is no prevailing party.

REASONS FOR GRANTING THE WRIT

(1) Legislatures rather than fund additional judges increasingly promote alternative dispute resolution, primarily arbitration of controversies. The public believes an arbitrator is similar to a judge, but serves by agreement of parties rather than by routine assignment.

Arbitrators however are more powerful than judges. They are generally not required to know the law, their decisions are not reviewable if contrary to the law, and even if there is a reservation of review of questions of law, all are merged in an arbitrator's decision as a matter of expediency and closure often with little regard to rights of the parties. Often the arbitrators are not lawyers.

Conflict among the jurisdictions invites study of arbitration in America in the course of briefing when certiorari is granted herein. It is time for guidance here.

(2) Prevailing party status is important for right to costs, but costs even with extensive deposition practice is rarely confiscatory as to economic posture of a party. But

where an attorney fee provision exists, as is standard in commercial contracts, a party with unlimited resources (having access to liability counsel) make a high-stakes poker-game out of even small claims controversies; such as attorney fee awards in this case of $81,000 in a civil complaint that did not exceed $7795.15 (of which ¾ was third-party claims that litigant was without standing to bring, vendors who had sent bills for services to an apartment building and merely waited for someone to pay. See *Pacific Pine Lumber Co. v. Western Union Telegraph*, 123 C 428; 56 P 103.) It is important for America that 'prevailing party' designations be strictly construed, cautiously awarded, to avoid results such as would shock the Chancellor.

(3) Sanctions are traditionally monetary, and not such as to foreclose one's right to a fair hearing on the merits consistent with due process of law. Courts may dismiss a complaint or cross-complaint for rather minor discovery failings, or even for conduct that is arguably appropriate by the party; and in a case headed for arbitration, judicial conduct is immunized by the nonreviewable procedure – even when parties specifically reserve appellate rights to question abuse of discretion on part of the trial court pre-arbitration – assignment. The abuse here, dismissal of petitioner's cross-complaint against a property manager, was on basis of sitting for 3 hours instead of 6 in one of several depositions offered, one judge ordering 6 hours but stating that not more than a half-day would really be needed, and out-of-state petitioner providing that half-day (over 3 hours) with offer of additional time when he was soon in propounding

party's city – a 2nd judge finding the refusal contemptuous, striking petitioner's cross-complaint, removing issue for all time from arbitration or review.

While sanctions are in discretion of trial court, the penalty must be appropriate to the derelection and not exceed the protection required to protect interests of the party entitled to, but denied, discovery. *A&M Records, Inc. v. Heilman,* 1977, 75 CA3d 554. Surely petitioner's sitting for 3½ hours, on ambiguous order for 6, with offer of more upon petitioner's being in San Diego (his former home, where he has a 2nd home and frequent visits), is appropriate for monetary sanction. Sanctions require bad faith, and ineptitude is not synonymous with bad faith. *Monox v. Peinado,* 1990, 224 CA3d 1619; 274 CR 667.

(4) Third issue here is related to the first, (3) being merely an example of destructive errors and abuses by a trial court that forever evade review by the immunization given to laymen and lawyers privileged to serve as arbitrators.

In hearings before the Municipal Court, in review by the Superior Court Appellate Department, in petition for review by the California Supreme Court, federal constitutional rights were argued by or on behalf of petitioner herein.

The Arbitrator, whose opinion is found in Appendix, merely limited himself to 4 issues noted by the Court in the arbitration assignment, and would not consider the stricken cross-complaint. Motions in limine presented by petitioner were rejected and returned, the arbitrator viewing and resolving the dispute as an 'accounting'

dispute as to funds received/disbursed from rental revenues.

The apparently meaningless "Appellate Court rights reserved" boilerplate Stipulation for Arbitration remains as a trap for the unwary, even the sophisticated unwary such as petitioner, a Georgetown Law graduate with 37 years in the law as a student and as a practitioner.

What does binding arbitration mean? Is the Stipulation of parties here meaningful? Is there any reason to reserve *statutory rights* to vacate an award – misconduct, corruption, etc.? Of course not. Reservation of rights means abuse-of-discretion, errors of law. The judicial system is estopped from denying plain unequivocal language in forms it permits Clerks to provide for processing of disputes.

Binding arbitration is dead in Nevada, alive in California! The Nevada Supreme Court in *Wichinsky v. Mosa,* 109 Nv. 84, 847 P2d 727 (1993) adopted a non-statutory concept for review of arbitration awards called "manifest disregard of the law". See also *Graber v. Comstock Bank,* 111 Nv. 1421, ___, 905 P2d 1112 (1995). In *Winchinsky,* supra, the Court overruled the arbitrator's decision, holding that "the arbitrator demonstrated a manifest disregard of the law by awarding punitive damages in the absence of clear and convincing evidence" (at page 90). The case was assigned to a new arbitrator to determine once again the issues between the parties. In *Graber,* the trial court confirmed the arbitration award, the Supreme Court reversed and remanded to the trial court for reconsideration, to determine whether the arbitrator "manifestly disregarded the law". Nevada, like California

permitted vacating an award only on narrow grounds such as corruption, fraud, evident partiality. (NRS 38.145).

Nevada and 36 other states adopted the Uniform Arbitration Act, which intentionally excludes errors of law and fact, or "manifest disregard of the law" as a basis for review. *Moncharsch v. Heily & Blase,* 3 CA4th 1, 10 CR2d 183, 832 P2d 899 (1992). Nevada's court found that the legislature had not intended to abrogate common law grounds for review.

The *sine qua non* of Petitioner's problems here is the prevailing party finding, inconsistent with statute and caselaw, and defying review because the arbitrator is beyond review so long as he or she is honest and sober.

California's statute defines prevailing party to include "a defendant where neither plaintiff nor defendant obtains any relief" and "a defendant as against those plaintiffs who do not recover any relief against that defendant". *Cal. Code of Civ. Proc. 1032(a)(4).*

The Arbitrator's award gave -0- to respondent here, and Petitioner was not found guilty of fraud as alleged in the Complaint. The arbitrator clearly had authority to award punitive damages. *Tate v. Saratoga S&L,* 216 CA3d 843, 265 CR 440 (1989). In *Adler v. Vaicius,* 1993, 21 CA4 1770, 27 CR 2d 32, plaintiff obtained TRO against defendant, later dismissed his complaint. Arguably he was prevailing party. The Court, mindful that it was dealing with punitive measures meriting strict interpretation, followed the statutory limitation and found defendant to be prevailing party.

And in *McLarand, Vasquez & Partners, Inc. v. Downey Sav. & Ln. Assn.*, 1991, 231 CA3d 1450, 282 CR 828, the court found that despite plaintiff's success in defeating defendant's cross-complaint, it was not the prevailing party, finding that "Defendant, where neither plaintiff nor defendant obtains any relief" did not include plaintiff as a cross-defendant.

In the Superior Court (Appellate Department), petitioner argued (Reply Brief p. 7) that:

> "For a litigant (Schaefer) who provided at least 5 times as much discovery to his adversary (Fefferman), as he received in return, and to have his cross-complaint killed by Judge #2 interpreting an order of Judge #1 (whose order was ambiguous and evidently misconstrued by Schaefer) is inconsistent with due process and equal protection of the law. *14th Amendment*, U.S. Constitution."

This is the Court that last reviewed the matter on the merits, unanimously affirming judgment of the Municipal Court upon award in arbitration. Making no findings, no conclusions, no opinion.

In the Supreme Court of California on petition for writ of review, petition by counsel argued:

> An issue presented is whether Petitioner has been deprived of due process of law under the Fourteenth Amendment to the United States Constitution because he has been denied meaningful appellate review of the arbitrator's decision and award; another issue presented being whether Petitioner has been deprived of said due process of law because he has been denied

the opportunity to pursue the claims stricken from the Cross-Complaint.

> Citing *Lassiter v. Dept. of Social Services* (1981), 452 US 18; 101 S Ct 2153; 68 L Ed 2d 640, it was argued that the trial court's order striking the cross-complaint unfairly deprived Petitioner of the right to pursue his claims contained in the cross-complaint, and that he had not been allowed the opportunity to obtain a full appellate review of the arbitrator's award, as the parties agreed when they stipulated for binding arbitration (appellate rights reserved), all depriving petitioner of due process of law. The Fourteenth Amendment providing that no state shall "deprive any person of . . . property . . . without due process of law".

California's highest court denied hearing without comment.

CONCLUSION

Petitioner brings a short message. He has been denied meaningful review. The arbitrator has been immunized to be above the law, inconsistent with the view of the highest court of a sister jurisdiction, Nevada.

Petitioner claims denial of his rights to due process and equal protection of the law by the trial court, and by the arbitrator, and by the reviewing Court, the Superior Court of San Diego County Appellate Division. Petitioner meets all requirements to be prevailing party, *de facto, de jure.*

A civil claim which cannot exceed $1,754.88 after deducting vendor bills that claimant had no standing to claim ($6,040.27) is paid by petitioner upon filing of a demand for $15,605.79, the full $21,646.06, ($15,605.70 paid) with arbitration a few months later refusing to consider the cross-complaint, awarding -0- to each party, but making a prevailing-party finding that is a manifest disregard of the law, both statute and caselaw. With more than $85,000 attorney fees and costs awarded to date. And evades review because the arbitrator is a super-Judge.

It is not the statutes that are unconstitutional, it is the unconstitutional misapplication of same by laymen or lawyer sitting as Arbitrator that is part of a system that permits manifest disregard of the law. In some jurisdictions.

This Court should grant petition herein, and upon review should direct the Superior Court to examine each issue on the merits, render findings and conclusions that document a meaningful review and not just a hands-off treatment of an arbitration award, with petitioner to be the prevailing party consistent with California law, with respect to petitioner's rights guaranteed by the Fourteenth Amendment U.S. Constitution.

Respectfully submitted,

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IN THE MUNICIPAL COURT OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO

IRA FEFFERMAN, dba UPTOWN PROPERTY MANAGEMENT, Plaintiff, v. MICHAEL SCHAEFER, and DOES 1 through 10, inclusive, Defendants.	Case No. 565793 COMPLAINT FOR BREACH OF CONTRACT, GOODS SOLD AND DELIVERED, ACCOUNTS STATED, OPEN ACCOUNT, AND FRAUD

Plaintiff alleges as follows:

GENERAL ALLEGATIONS

1. Plaintiff, IRA FEFFERMAN is and at all times mentioned herein was, an individual doing business in San Diego County as UPTOWN PROPERTY MANAGEMENT ("UPTOWN").

2. Plaintiff is informed and believes, and thereon alleges, that defendant, MICHAEL SCHAEFER, is, and at all times mentioned herein was, an individual residing in San Diego County, California.

3. The true names and capacities whether individual, corporate or otherwise, of defendants named herein as DOES 1 through 10, inclusive, are unknown to plaintiff, who is informed and believes and thereon alleges, that each of fictitiously named defendants is liable to plaintiff on the causes of action herein alleged, and therefore, plaintiffs sue said defendants by their fictitious names. Plaintiff will move to amend this complaint when the true names and capacities of said fictitiously named defendants have been ascertained.

4. At all times herein mentioned, each of the defendants was the agent and employee of each of its co-defendants, and in doing the things herein mentioned, was acting in the scope of its authority as such agent and employee, and with the permission and consent of its co-defendants.

FIRST CAUSE OF ACTION

(Breach of contract)

5. Plaintiff incorporates by reference paragraph 1-4 hereinabove as though same were set forth in full herein.

6. On or about December 8, 1993, plaintiff entered into a written contract with defendants SCHAEFER and does 1 through 10 for management of property located at 1312 12th Ave. and 1323 11th Ave. in San Diego, California (hereinafter "property"). A true and correct copy of the contract is attached hereto and incorporated herein by reference as Exhibit "A".

7. Plaintiff has fully performed all conditions, covenants and promises required to be performed on its part by the contract. Despite demand for payment, commencing on or about May 25, 1994, and continuing thereafter, defendants breached the contract by, inter alia, failing to remunerate plaintiff in a timely fashion as delineated in said contract.

8. As a result of said defendants' breach, plaintiff has been damaged in the principal sum of $7,795.15, together with interest thereon at the legal permissible rate from a date according to proof.

9. Plaintiff has been compelled to engage the Law Offices of Charles S. LiMandri to prosecute the instant action. Pursuant to the terms of the contract, plaintiff is entitled to reasonable attorneys' fees and costs in the prosecution of the instant action.

SECOND CAUSE OF ACTION

(Goods sold and Delivered)

10. Plaintiff incorporated by reference paragraphs 1-9 hereinabove as though same were set forth in full herein.

11. Within two years last past in San Diego, California, defendants SCHAEFER and DOES 1 through 10 became indebted to plaintiff in the sum of $7,795.15 for goods sold and delivered by plaintiff to defendants, and each of them, at the special instance and request for said defendants, and each of them. The agreed reasonable value of said goods is and was in the principal sum of $7,795.15, and said defendants agreed to pay said sum to plaintiff.

12. No part of said sum has been paid despite demand therefor, and there is now due, owing and unpaid the principal sum of $7,795.15 together with interest thereon at the maximum permissible legally permissible rate from a date according to proof.

THIRD CAUSE OF ACTION

(Account Stated)

13. Plaintiff incorporated by reference paragraphs 1-12 hereinabove as though same were set forth in full herein.

14. Within four years last past in San Diego, California, an account was stated in writing by and between plaintiff and defendants wherein it was agreed that said defendants were indebted to plaintiff in the amount of $7,795.15.

15. No part of said sum has been paid, and there is now due owing and unpaid from said defendants to plaintiff the sum of $7,795.15, together with interest thereon at the maximum legally permissible rate from a date according to proof.

FOURTH CAUSE OF ACTION

(Open Account)

16. Plaintiff incorporated by reference paragraphs 1-15 hereinabove as though same were set forth in full herein.

17. Within two years last past in San Diego, California, defendants became indebted to plaintiff on an open book account in the principal sum of $7,795.15.

18. No part of said sum has been paid despite demand therefor, and there is now due, owing and unpaid, the principal sum of $7,795.15, together with interest thereon at the maximum legally permissible rate from a date according to proof.

FIFTH CAUSE OF ACTION

(Fraud)

19. Plaintiff incorporates by reference paragraphs 1-18 hereinabove as though the same were set forth in full herein.

20. By virtue of the agreement with plaintiff and subsequent oral and written representations, defendant SCHAEFER promised that plaintiff would not be required to advance his own funds to fulfill the terms of the agreement. Defendant SCHAEFER further promised that he would promptly reimburse plaintiff for any such funds plaintiff advanced.

21. In keeping with his pattern of dealing with other persons who managed the property before and after plaintiff, defendant SCHAEFER made such promises with

the intent not to perform and with the intent to defraud plaintiff. Specifically, defendant knew from experience that in order to perform the agreement, plaintiff would be required to advance his own funds for operating expenses, renovation and maintenance because defendant had not tendered, and did not tender, sufficient money as an owner's fund for plaintiff to use to manage the property. On the contrary, at all times herein mentioned, defendant intended to have plaintiff advance his own funds to manage the property and then fabricate false accusations of non-performance by plaintiff as an excuse for failing to supply sufficient operating funds and to reimburse plaintiff.

22. Plaintiff was unaware of defendant's intention not to perform his promises when plaintiff entered into the agreement. At all relevant times herein, plaintiff reasonably relied on defendant's promises by advancing his own fund and otherwise performing the agreement at his own expense, with the expectation of being reimbursed by defendant.

23. As a proximate result of relying upon defendant's promises, plaintiff has sustained damage in an amount exceeding $7,795.15 according to proof.

24. At all times herein mentioned, defendant acted wantonly, maliciously, and with the intent to harm and deprive plaintiff of his rights, thereby justifying the award of exemplary damages.

WHEREFORE, plaintiff prays judgment against defendants as follows:

FIRST CAUSE OF ACTION:

1. For a principal sum in excess of $7,795.15, according to proof;

2. For interest thereon;

3. For reasonable attorneys' fees incurred herein;

4. For costs of suit incurred herein; and

5. For such other and further relief as the court deems just and proper.

SECOND CAUSE OF ACTION:

1. For a principal sum in excess of $7,795.15, according to proof;

2. For interest thereon;

3. For reasonable attorneys' fees incurred herein;

4. For costs of suit incurred herein; and

5. For such other and further relief as the court deems just and proper.

THIRD CAUSE OF ACTION:

1. For a principal sum in excess of $7,795.15, according to proof;

2. For interest thereon;

3. For reasonable attorneys' fees incurred herein;

4. For costs of suit incurred herein; and

5. For such other and further relief as the court deems just and proper.

FOURTH CAUSE OF ACTION:

1. For a principal sum in excess of $7,795.15, according to proof;

2. For interest thereon;

3. For reasonable attorneys' fees incurred herein;

4. For costs of suit incurred herein; and

5. For such other and further relief as the court deems just and proper.

FIFTH CAUSE OF ACTION:

1. For general damages exceeding $7,795.15, according to proof;

2. For interest thereon;

3. For reasonable attorney's fees incurred herein;

4. For exemplary damages;

5. For costs of suit incurred herein; and

6. For such other and further relief as the Court deems just and proper.

DATED: August 10, 1994 LAW OFFICES OF CHARLES W. LiMANDRI

/s/ Tim Ireland
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IN THE MUNICIPAL COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO

SAN DIEGO JUDICIAL DISTRICT

IRA FEFFERMAN etc. Plaintiff v. MICHAEL SCHAEFER Defendant	Case No. 565793 CROSS COMPLAINT FOR MONEY DAMAGES
MICHAEL SCHAEFER Cross-complainant v. IRA FEFFERMAN, dba UPTOWN PROPERTY MANAGEMENT Cross-defendant	

COMES NOW Cross-complanant [sic] MICHAEL SCHAEFER alleging as follows:

Jurisdiction for this action arises from ~~diversity of~~ fact that transactions giving rise to allegations herein took ~~citizenship of the parties, cross-complainant at all times~~ place within the San Diego Judicial District; ~~since~~

~~commencement of the action being resident of Nevada, cross-defendant at all times relevant being resident of California the matter involving controversy in excess of $50,000, Title 38, USC sec. 1332(a).~~

FIRST CAUSE OF ACTION (ACCOUNTING)

1. Cross-complainant is a resident and citizen of Nevada, cross-defendant is a resident and citizen of California.

2. Amount in controversy herein exceeds $50,000.

3. From December 8, 1993 until May 15, 1994, cross-defendant assumed control and management of cross-complainant's real estate situate at 1312 12th Ave. and 1323 11th Ave., San Diego, Cal. commonly known as Riviera Apartments;

4. Said premises had a scheduled income of about $33,000 monthly, and actual revenues of about $25,000 monthly, or for a period of 5¼ months, this being $131,250 expected revenues if no improvement in operation.

5. Cross-defendant has evidenced for cross-complaint less than $60,000 in revenues for said period.

6. Demand is made for an accounting by cross-defendant for all revenues received, or receivable, during the above period, known as "Uptown Operation", with judgment for any deficiency below said $131,250 level in favor of cross-complainant.

SECOND CAUSE OF ACTION (NEGLIGENCE)

7. Cross-complainant incorporates by reference allegations set forth in paragraphs 1 through 4 of first cause of action.

8. Cross-defendant owes a duty to the public in general and to cross-complainant in particular, to exercise that degree of skill and care and talent reflecting the standard of the commercial real estate management firms in the San Diego, Cal. community; cross-defendant breached that duty to negligent, sloppy, conspiratorial and inattentive services and management, directly causing damages to cross-complainant in amounts in excess of $50,000.

9. Cross-defendant's actions were wilful, malicious, and intentional, and were calculated to feather its nest at the expense of, and in conflict with, to property owner that cross-defendant has contracted with to serve faithfully and prudently and competently; said actions and inactions being grossly negligent in comparison to standards of the community.

10. Cross-defendant should be held by way of punitive damages to discourage such outrageous commercial conduct in an amount not less than $500,000.

THIRD CAUSE OF ACTION (DECEIT)

11. Cross-com.incorporates by reference allegations set forth in paragraphs 1 through 4 of his first cause of action.

12. Cross-defendant, on December 8, 1993, deceitfully and without intention to perform in the best interests of cross-complaint, entered into PROPERTY MANAGEMENT AGREEMENT attached as Exhibit to Complaint on file herein (August 10, 1994, Municipal Court), assuring cross-complainant of cross-defendant's talent, expertise, agressive [sic] marketing and management, negotiating a 6% management fee rather than 5% common in the management fee rather than 5% common in the management community, a $500 fee for setting-up records, demanding public and premises liability insurance and then negotiating a private indemnity on part of cross-complainant, 8 days later, to hold-harmless UPTOWN and cross-defendant from claims arising such as would otherwise be covered by a public and premises liability insurance policy, until such policy could be obtained.

13. Cross-defendants acts and omissions were intentional, wilful, calculated to deceive cross-complainant during the Uptown Operation, cross-defendant having reason to believe that cross-complainant found same credibille [sic], and would reasonably rely thereon; cross-complainant acting in reasonable reliance on representations and misrepresentations of said cross-defendant to his damage in amounts exeeding [sic] $50,000.

14. Cross-defendant's actions were wilful, malicious, and intentional; cross-defendant should be held by way of punitive damages to dissuade such outrageous conduct in the future in amounts not less than $500,000.

FOURTH CAUSE OF ACTION (IMPLIED COVENANT OF GOOD FAITH)

15. Cross-complainant incorporates by reference allegations set forth in paragraphs 1 through 4 of his first cause of action.

16. There exists in every contract arising in California an implied covenant that requires the parties to deal fairly with one another and to not act to defeat the reasonable expectancies of the other;

17. Cross-defendant breached said implied covenant, proximately causing damages to cross-complainant in amounts according to proof., in excess of $50,000;

FIFTH CAUSE OF ACTION (BREACH OF CONTRACT)

18. Cross-complainant incorporates by reference allegations set forth in paragraphs 1 through 4 of his first cause of action;

19. Parties on December 8, 1993 entered in written contract of 6 pages, captioned PROPERTY MANAGEMENT AGREEMENT, found as Exhibit to Cross-defendant's original complaint on file herein.

20. Cross-defendants breached said contract, said breach proximately causing damages to cross-complainant in amounts according to proof, in excess of $50,000.

21. Said breaches include the following:

(a) failure to use due diligence in perofomance [sic] of duties as is provided in paragraph 2(a) thereof;

(b) failure to advertise the availability of rentals in the most logical market, some 12,000 college students attending City College across the street and having a campus publication available for advertising; said failure being notwithstanding continuing requests and demands from owner that such be done; para. 3(a).

(c) failure to pay bills for services and supplies, per paragraph 3(d).

(d) failure to obtain prior owner approval on all expenditures over $800, per para. 3(d), excepting ongoing utilities and/or emergencies.

(e) failure to return deposits to tenants or forward them to owner as of May 15, 1994 cessation of services, per paragraph 3(h).

(f) failure to disclose amounts of money involved in transactions containing inherent conflicts of interest, failure to purchase services and materials at competitive rates in the open market as had been owner's practice rather than utilize cross-defendant's own personnel at inflated charges;

(g) failure to refer cross-defendant's dispute and claim, as evidenced by his Complaint, to neutral binding arbitration, as is required by para. 11. if parties initialed any copy of the Agreement (copy attached to Complaint is not initialed), there being no evidence of rejection of arbitration by either party.

(h) failure to use common sense priorities of renovation of vacant units so that prospective tenants would have a variety of attractive accommodations available, the number of unrentable and vacant units being about constant from December 8, 1993 to May 15, 1994;

SIXTH CAUSE OF ACTION (CONFLICT OF INTEREST) (CIVIL CONSPIRACY)

22. Cross-complainant incorporates by reference alle ations set forth in paragraphs 1 through 4 of first cause of action;

23. Cross-defendants, knowing that their successor in management on May 15, 1994, George J. Apostle, was vehement and astounded at the dissaray and unmaintained premises he took-over as Lessee-operator, with extensive damaging testimony to be used against Cross-defendants FEFFERMAN and UPTOWN, co-opted him in an unconsionable [sic] attempt to silence his adverse expected testimony by accepting him, if not soliciting him, as a client of Cross-defendant's lawyers, with the result that disputes between Cross-complainant SCHAEFFER and his lessee-operator-manager May 14, 1994-July 31, 1994, are being defended as to APOSTLE by the FEFFERMAN/UPTOWN counsel herein.

24. Such actions are a conspiracy to defraud cross-complainant, such conspiracy proximately causing damages to cross-complainant in amounts according to proof, in excess of $50,000.

WHEREFORE, cross-complainant prays for judgment as follows:

1. For causes of action one through six, general and compensatory damages according to proof, in amounts in excess of $50,000, plus punitive damages, where sought, in amount of $500,000 for each cause. Plaintiff waives and remits recovery in excess of $25,000.00. MS

2. For interest thereon, costs of suit including reasonable attorney fees, and such further relief as appears just in the premises.

Date: ~~October 20~~, December 19 1994

/s/ M. Schaefer
MICHAEL SCHAEFER
Cross-complainant Pro Se

JURY DEMAND

Cross-complainant demands trial by jury as to all questions of fact contested herein.

Date: December 19, 1994 /s/ M. Schaefer

MUNICIPAL COURT OF CALIFORNIA

COUNTY OF SAN DIEGO – SAN DIEGO JUDICIAL DISTRICT

IRA FEFFERMAN dba UPTOWN PROPERTY MANAGEMENT, Plaintiff, v. J. MICHAEL SCHAEFER and DOES 1 THROUGH 10, inclusive, Defendants.	CASE NO. 565793 ORDER AWARDING SANCTIONS AGAINST DEFENDANT J. MICHAEL SCHAEFER AND VACATING HEARING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
AND RELATED CROSS-ACTION.	

The hearing on plaintiff's Motion and this Court's Order to Show Cause Why It Should Not Strike the Answer and Cross-Complaint of Defendant J. Michael Schaefer, or in the Alternative, Award Other Sanctions, and the hearing on the timeliness of Defendant's Motion for Summary Judgment came on regularly for hearing by this Court on November 16, 1995. Plaintiff IRA FEFFERMAN dba UPTOWN PROPERTY MANAGEMENT ("Uptown") appeared by counsel R. Timothy Ireland. Defendant and cross-complainant J. MICHAEL SCHAEFER ("Schaefer") appeared in pro per.

The Court having considered the papers of the parties, the arguments of counsel and on proof made to the

satisfaction of the Court that Schaefer has exhibited a substantial history of misusing the discovery process in this case, and has failed to show good cause for violating an order of this Court compelling his deposition, hereby orders as follows:

IT IS ORDERED THAT:

1. The cross-complaint of defendant Schaefer is stricken in its entirety, except to the following limited extent. Schaefer shall be permitted to pursue only his breach of contract causes of action at trial, and evidence on that claim shall be limited to the issue of whether Uptown mishandled tenant security deposits, and the amount of damage, if any, caused thereby. All other causes of action and allegations are hereby dismissed with prejudice, and shall not be refiled in this or any other court or forum against Ira Fefferman, Uptown Property Management, their attorneys Charles S. LiMandri and R. Timothy Ireland or their respective representatives.

2. Schaefer shall pay monetary sanctions to cover the costs of his deposition on November 15, 1995. The amount of said sanctions shall be set by the Court as follows. Counsel for plaintiff shall submit a letter directly to the court itemizing the costs of the deposition, along with a proof of service showing delivery of the same to Schaefer by express-mail or facsimile. Within ___ days of service thereof, Schaefer may submit a written rebuttal challenging whether said costs were incurred, along with a proof of service showing delivery of said rebuttal to plaintiff's counsel by express mail or facsimile. Thereafter this Court will issue a minute order identifying the

amount and deadline for payment of said monetary sanctions.

IT IS FURTHER ORDERED THAT the hearing on Schaefer's Motion for Summary Judgement currently scheduled for December 1, 1995 at 8:30 a.m. in Department C-2 of this Court is hereby vacated on the grounds that the motion is untimely and good cause does not exist for modifying the requirement of CCP Section 437c(a) that such motions be heard at least 30 days before trial.

Dated: NOV 20 1995

TIMOTHY W. TOWER
JUDGE TOWER
Judge of the
Municipal Court

EXHIBIT C

MUNICIPAL COURT OF THE STATE OF CALIFORNIA
SAN DIEGO JUDICIAL DISTRICT

IRA FEFFERMAN,
Plaintiff(s),
vs.
MICHAEL SCHAEFFER,
Defendant(s).

Case No. 565793

STIPULATION FOR ARBITRATION (APPEAL RIGHT RESERVED)

Plaintiff(s) and defendant(s) stipulate that the above-entitled matter may be submitted to arbitration pursuant to C.C.P. § 1141.12 and California Rules of Court 1600.

1. **ARBITRATOR**

   [✓] It is stipulated that 1st Don Harrington; 2nd Roscoe Keagy; ~~3rd illegible~~ shall be designated to serve as arbitrator.

   (Alternate Choice: _____)

   [✓] It is requested that an arbitrator be appointed pursuant to California Rules of Court.

2. **BINDING ARBITRATION**

   [✓] It is stipulated that this arbitration is to be **BINDING.** (Signatures of all parties to the action required. However, all Appellate Court rights are reserved.

3. **APPOINTMENT OF ARBITRATOR EFFECTIVE:** 12-18-95 for 60 days

4. **ESTIMATED TIME FOR HEARING IS:** 1/2 day

5. [ ] **PLEASE INDICATE IF THIS IS A CONTRACTUAL ARBITRATION CASE.**

Dated: 12-18-95

/s/ Illegible	/s/ Tim Ireland
~~Attorney for~~ Plaintiff	Attorney for ~~Signature of~~ Plaintiff
/s/ M Schaefer	
Attorney for Defendant pro per	Signature of Defendant
Attorney for Defendant	Signature of Defendant
Attorney for Defendant	Signature of Defendant

SDMC38: (Rev. 05/)

MUNICIPAL COURT OF CALIFORNIA
COUNTY OF SAN DIEGO

STIPULATION AND ORDER****

CASE NO. 565793

Uptown	VS Schaefer
Plaintiff(s)	Defendant(s)

Plaintiff (present) (not present) represented by

Attorney R. Timothy Ireland

Defendant (present) (not present) represented by

Attorney J. Michael Schaefer

THE PARTIES HEREBY STIPULATE AND AGREE as follows: The matter shall be decided by binding arbitration. Arbitrator to be selected within 12 days. Hearing to be

completed on or before Feb. 15, 1996. The issues to be determined by the arbitrator will be

(1) Wheather [sic] Uptown mishandled tenant security deposits to Schaefer's damage, and illegible

(2) Whether Schaefer was obligated to pay principal and interest of approximately $21,000 to Uptown prior to December of 1995.

(3) Whether Schaefer is entitled to a refund.

(4) Prevailing party status and award of fees and costs and reasonableness of amounts hereof.

We have read the entire stipulation and agreement. We understand it full and request the Court to make our stipulation and agreement the Court's order.

/s/ Tim Ireland	/s/ M. Schaefer
Attorney for Plaintiff	Attorney for Defendant
/s/ Illegible	/s/ Michael Schaefer
Plaintiff	Defendant

IT IS SO ORDERED THIS 18 DAY OF DEC 1995

/s/ Timothy W. Tower
JUDGE OF THE MUNICIPAL COURT
TIMOTHY W. TOWER

STATUS CONFERENCE SET FOR _____ AT 8:30 A.M. IN DEPARTMENT C-2.

****THIS IS NOT A JUDGMENT OR DISMISSAL! THE PARTIES STILL MUST FILE A DISMISSAL OR JUDGMENT WITH THE COURT IN THE BUSINESS OFFICE 15

DAYS PRIOR TO ABOVE DATE TO HAVE CASE TAKEN OFF CALENDAR.

ATTORNEY OR PARTY WITHOUT ATTORNEY
(Name and Address):

DON L. HARRINGTON
401 WEST A STREET, SUITE 1200
SAN DIEGO, CA 92101

ATTORNEY FOR *(Name)* (ARBITRATOR)

TELEPHONE NO.: (619) 232-0494

BAR #: 30935

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO**

X CENTRAL COURTHOUSE, 220 W. BROADWAY, P.O. BOX 128, SAN DIEGO, CA 92101-4104

___ NORTH COUNTY BRANCH, 325 S. MELROSE, VISTA, CA 92083-6827

___ EAST COUNTY COURT, 250 E MAIN, EL CAJON, CA 92020-3913

___ SOUTH BAY COURT, 500 THIRD, CHULA VISTA, CA 91910-5694

PLAINTIFF(S) PETITIONERS(S)
IRA FEFFERMAN

DEFENDANT(S) RESPONDENT(S)
J. MICHAEL SCHAEFER

AWARD OF ARBITRATOR (CCP 1141.23 & CRC 1615)

COURT USE ONLY

FILED
KENNETH E. MARTONE
Clerk of the Superior Court

FEB 16 1996

By: M. L. MOORE, Deputy

JUDGMENT BOOK AND PAGE

CASE NUMBER 565793

The above-entitled case came on for Arbitration Hearing on 01-29-96 AND 01-30-96. The parties, as indicated above, appeared, were sworn and evidence was presented. The undersigned arbitrator makes the following award in full settlement of all claims submitted for arbitration:

X Plaintiff(s), IRA FEFFERMAN

shall recover from defendant(s) J. MICHAEL SCHAEFER

Principal:	$ NONE (SEE ATTACHED OPINION)
Interest:	$ NONE
Attorney Fees:	$ 48,000.00
Total Award:	$ 48,000.00

___ Plaintiff(s) claim is denied.

X Costs, in the sum of $ PER COST MEMO, ARE AWARDED TO: plaintiff

___ The parties to the arbitration shall bear their own costs.

___ Disposition is made as follows to the cross-complaint of _____:

JUDGMENT ENTERED ON MAR 11 1996
BY /s/ B. Bascos
B. BASCOS
Dated: FEBRUARY 14, 1996

/s/ Don L. Harrington
Arbitrator
DON L. HARRINGTON

INSTRUCTIONS FOR ARBITRATORS – If your award is to be entered as a judgment of this court, you must show clearly, **THE FULL NAME(S) OF ALL PARTIES CONCERNED WITH THIS AWARD.** In addition, you must make a disposition as to **ALL,** parties in the action, including any cross-complainants. This award, accompanied by proof of service on **EACH** party, shall be filed within ten days subsequent to the hearing, **DIRECTLY** in the Arbitration Division. If additional space is required attach additional pages, incorporating them in reference, with this award.

AWARD OF ARBITRATOR

DON L. HARRINGTON
SBN: 30935
401 West A Street, Suite 1200
San Diego, CA 92101
(619) 239-7315

Arbitrator

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO

ARBITRATION DEPARTMENT

IRA FEFFERMAN, Plaintiff, v. J. MICHAEL SCHAEFER, Defendant.	SAN DIEGO MUNICIPAL COURT Case No. 565793 ARBITRATOR'S OPINION

Following is a review and summary of the bases upon which this arbitrator's decisions were predicated for each of the areas to be resolved as set forth in the "Stipulation and Order" entered into by the parties on December 18, 1995:

ISSUE NO. 1: "Whether Uptown mishandled tenant security deposits to Schaefer's damage and what amount."

Following Schaefer's termination of the management contract with Uptown Property Management, it was determined that there was on deposit, representing the tenants' security deposits, the sum of $6,302.00 (See

Plaintiff's Exhibit No. 45). This amount was delivered to George Apostle by Uptown Property Management's check No. 1055 together with a transmittal letter dated June 10, 1994. Prior to this date, Schaefer had represented to Uptown Property Management and the tenants of the property that George J. Apostle "will be fully responsible for all matters related to the operation of the building" (See Plaintiff's Exhibit Nos. 33, 34 & 35). Schaefer's letter dated June 7, 1994 (see Plaintiff's Exhibit No. 43), directing that the security deposit be delivered to him did not, as a matter of law, preclude delivery to his agent. This is supported by the fact that following the payment to Apostle, Schaefer sent a letter dated June 15, 1994, to Uptown Property Management (see Plaintiff's Exhibit No. 46). The only objection that was raised by Schaefer to the payment was that he did not receive a copy of the transmittal letter.

The payment of the security deposit to Apostle (agent) is deemed payment to Schaefer (principal). There is no further liability on behalf of Uptown Property Management to Schaefer for the security deposits.

ISSUE NO. 2: "Whether Schaefer was obligated to pay principal and interest of approximately $21,000 to Uptown prior to December of 1995."

This issue involves two aspects:

(A) The monies that Uptown Property Management had either actually paid out on behalf of Schaefer and the sums that Uptown Property Management had earned under the terms of the management agreement. These

sums have been categorized (See Plaintiff's Exhibit No. 50) as:

1. Advances by Uptown to Outside Vendors
   Principal and interest ..... $ 7,318.60
2. Unpaid Uptown Services and Supplies
   Principal and interest ..... $ 6,175.69
3. Renovation Fee
   Principal and interest ..... $ 2,111.50

TOTAL..... $15,605.79

(B) Those obligations incurred in the name of Uptown Property Management incidental to the management and renovation work engaged in by Uptown Property Management. These sums have been categorized as:

Unpaid Obligations to Outside Vendors
Principal and interest..... $ 6,040.27

With respect to the first category, a review of the monthly operation statements (See Plaintiff's Exhibit Nos. 6, 7, 8, 9, 10, 13 & 14) submitted by Uptown Property Management to Schaefer reflects all of the disbursements made by Uptown Property Management, as further reflected in the summary of Uptown's Damage Calculations (see Plaintiff's Exhibit No. 50).

In view of the fact that all of this activity was disclosed by Uptown Property Management to Schaefer on a monthly basis and that there were no objections made to the expenditures, all are deem [sic] appropriate. The fact that on March 4, 1994, Schaefer made it clear that he wanted "prompt" action on the part of Uptown Property Management relative to the renovation and repair of the apartments (see Plaintiff's Exhibit No. 24) would support

expenditures and efforts by Uptown Property Management to the renovation of the property.

The sum of $15,605.79 is a valid and supportable sum due to Uptown Property Management by Schaefer as of December, 1995. This amount has been paid by Schaefer and therefore is not before this arbitrator. However, the amount represented by the second category requires a different resolution.

It is clear that one cannot seek recovery for an amount that has yet to accrue. The potential for liability is not sufficient. This principle was advanced by Schaefer in his Arbitration Memorandum, citing *Pacific Pine Lumber Co. v. Western Union Telegraph* 123 C 428, 56 P 103. The problem is that in the case now before the arbitrator the obligation is not contingent. The obligations created by Uptown Property Management in its effort to renovate and repair the property were incurred in its name, although on behalf of Schaefer. Under the terms of the management agreement, Uptown Property Management had the authority to act on behalf of Schaefer as his agent. Therefore any debt incurred by Uptown Property Management as the agent of Schaefer would either be the primary obligation of Schaefer, if it had been incurred in his name, or would be subject to the right of indemnification by Schaefer.

It may well be argued that the remedy should have been for indemnification rather than a money judgment. In either event, it is clear that as of December, 1995, Uptown Property Management has a legal claim against Schaefer based upon the claims asserted and summarized in the damages calculation (See Plaintiff's Exhibit No. 50).

The total of the claims, either for the monies then due Uptown Property Management or the amounts subject to the right of indemnification, are in excess of the $21,000.00. Therefore, it is found that as of December, 1995, Schaefer was obligated to pay a sum of approximately $21,000.00.

ISSUE NO. 3: "Whether Schaefer is entitled to a refund."

In light of the findings and holdings set forth in the above paragraphs, there is no refund due Schaefer. This applies to both the security deposits claim as well as the claim for overpayment of work and services performed.

ISSUE NO. 4: "Prevailing party status and award of fees and costs and reasonableness of amounts thereof."

Uptown Property Management is deemed the prevailing party in this action and shall be entitled to recover as reasonable attorney's fees the sum of $48,000.00.

The reasonableness of the award is in part predicated upon the history of the parties attempts to resolve this case by mutual agreement. The efforts of Uptown Property Management as late as late [sic] as August, 1995, were considered in establishing the amount of the attorney's fee.

Costs shall be awarded to plaintiff following the filing of a Memorandum of Costs and the responsive filing of any objections.

DATED: February 14, 1996

/s/ Don L. Harrington
DON L. HARRINGTON,
Arbitrator

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO
APPELLATE DIVISION

IRA FEFFERMAN dba UPTOWN PROPERTY MANAGEMENT, Plaintiff and Respondent, vs. J. MICHAEL SCHAEFER and DOES 1 through 10, inclusive, Defendants and Appellants.	SUPERIOR COURT CASE NO. 701142 MUNICIPAL COURT CASE NO. 565793 (San Diego Judicial District) **ORDER** (Filed Dec. 4, 1996)

The judgment of the Municipal Court is unanimously affirmed. Respondent's motion for sanctions pursuant to CCP 907 is denied. However, the matter is remanded to the Municipal Court for a determination of costs and fees on appeal to be awarded to respondent.

DATED: DEC. 04, 1996

/s/ Revak P.J.
REVAK

/s/ Preckel J.
PRECKEL

/s/ Hoffman J.
HOFFMAN

Copies to all parties

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

J. MICHAEL SCHAEFER, Petitioner, v. THE SUPERIOR COURT OF SAN DIEGO COUNTY, Respondent; IRA FEFFERMAN, Real Party in Interest.	D028048 (San Diego County Super. Ct. No. 701042) (Filed March 11, 1997)

THE COURT:

The petition for writ of review and request for stay have been read and considered by Justices Benke, Huffman and McIntyre. The petition is denied.

/s/ Huffman
HUFFMAN, Acting P.J.

Copies to: All parties

Fourth Appellate District, Division One,
No. D028048 S059962

IN THE SUPREME COURT OF CALIFORNIA

J. MICHAEL SCHAEFER, Petitioner

v.

SAN DIEGO SUPERIOR COURT, Respondent
IRA FEFFERMAN, Real Party In Interest

Application for stay and petition for review DENIED.

(Filed April 16, 1997)

GEORGE
Chief Justice